91-333

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM, 1991

RONALD W. GREGORY and DOROTHY L. GREGORY,

Petitioners,

vs.

FRONTIER MATERIALS, INC.; U. S. TRUSTEE; ST. VRAIN LEFT HAND WATER CONSERVANCY DISTRICT; FRONTIER AIRLINES FEDERAL CREDIT UNION; FIRST FEDERAL SAVINGS BANK OF OKLAHOMA; GRANGE MUTUAL LIFE CO.; BOULDER COUNTY, COLORADO; E.H.M.G. CONSULTANTS; ROSS J. WABEKE, Interim Trustee of Estate,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Ronald W. Gregory
Dorothy L. Gregory
Pro Se
c/o J. Bayne
P.O. Box 29773
Thornton, CO 80229-0773

Dated: April 25, 1991

APPENDIX A
Filed: August 29, 1990

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: RONALD W. GREGORY and DOROTHY L. GREGORY, Debtors,	)
RONALD W. GREGORY; DOROTHY L. GREGORY, Appellants, v. FRONTIER MATERIALS, INC.; U.S. TRUSTEE; ST.VRAIN LEFT HAND WATER CONSERVANCY DISTRICT; FRONTIER AIRLINES FEDERAL CREDIT UNION; FIRST FEDERAL SAVINGS BANK OF OKLAHOMA; GRANGE MUTUAL LIFE CO.; BOULDER COUNTY; E.H.M.G. CONSULTANTS, Appellees.	)No.89-1264
In re: RONALD W. GREGORY and DOROTHY L. GREGORY, Debtors.	)
RONALD W. GREGORY; DOROTHY L. GREGORY, Appellants, v. U.S. TRUSTEE; ROSS J. WABEKE, Trustee of Estate; FRONTIER AIRLINES FEDERAL CREDIT UNION; FRONTIER MATERIALS, INC., Appellees.	)No.89-1265

ORDER AND JUDGMENT*

before McKAY, SEYMOUR, and BRORBY, Circuit Judges

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed.R.App.P.34; 10th Cir.R.34.1.9. The cases are therefore ordered submitted without oral argument.

The judgment of the United States District Court for the District of Colorado, entered on July 31, 1989, which affirmed certain orders of the bankruptcy court, is AFFIRMED for substantially the reasons set forth therein. The issues raised by debtors in their briefs regarding breach of a settlement agreement and violations of constitutional rights during the bankruptcy court proceedings are not before this court because they were not properly argued to the bankruptcy court.

ENTERED FOR THE COURT
PER CURIAM

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir.R.36.3.

APPENDIX B
Filed: July 31, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 88-F-428
Bankr. No. 86 B 0476 G

In re: RONALD W. GREGORY and DOROTHY L. GREGORY,
Debtors.

RONALD W. GREGORY and DOROTHY L. GREGORY,
Appellants,
vs.
FRONTIER MATERIALS, INC., UNITED STATES TRUSTEE, ST. VRAIN LEFT HAND WATER CONSERVANCY DISTRICT, FRONTIER AIRLINES FEDERAL CREDIT UNION, FIRST FEDERAL SAVINGS BANK OF OKLAHOMA, GRANGE MUTUAL LIFE COMPANY, BOULDER COUNTY and E.H.M.G. CONSULTANTS,
Appellees.

Case No. 89-F-148
Bankr. No. 86 B 0476 A

In re: RONALD W. GREGORY amd DOROTHY L. GREGORY,
Debtors.

RONALD W. GREGORY and DOROTHY L. GREGORY,

Appellants,
vs.
UNITED STATES TRUSTEE, ROSS J. WABEKE, Trustee of Estate, FRONTIER AIRLINES FEDERAL CREDIT UNION, FRONTIER MATERIALS, INC.,
Appellees.

MEMORANDUM OPINION AND ORDER

These matters come before the court on

appeal from the United States Bankruptcy Court. Debtors appeal the March 2, 1988 order of the Bankruptcy Court converting debtors' Chapter 11 case to a Chapter 7 case, the December 14, 1988 order approving the sale of property of the estate, and the January 13, 1989 order denying debtors' motion to transfer proceedings. Jurisdiction is based on 28 U.S.C. 158. For the reasons stated below, the decisions of the United States Bankruptcy Court are affirmed.

Debtor contends that the bankruptcy court should have recused itself because of personal bias and prejudice under 28 U.S.C. 144 or 28 U.S.C. 455. The test to be applied is whether the circumstances are such that the judge's impartiality might reasonably be questioned. United States v. Ritter, 540 F.2d 45 462, (10th Cir. 1975) cert.den. 429 U.S. 1041 (1976). The facts must be evaluated from the viewpoint of a reasonable, objective observer. Bell v.

Chandler, 569 F.2d 556, 559 (10th Cir. 1977); United States v. Gigax, 605 F.2d 507, 511 (10th Cir. (1979). Disqualification should not be based on tenuous speculation; if it were, litigants would have veto power over the assignment of judges. Laxalt v. McClatchy, 602 F. Supp. 214, 217-18 (D. Nev. 1985), citing In re United States, 666 F.2d 690, 695 (1st Cir. 1981).

In arguing that the bankruptcy court was biased against them, debtors submit copies of notes, which debtors contend are copies of the Bankruptcy Judge's notes during the hearing. Despite the fact that these notes are not part of the record, this court has examined them and finds that noting therein establishes bias or prejudice, including the listing of Mr Gregory's employment history. Instead, the notes reflect a careful consideration of the evidence presented at the hearing.

Debtors also contend that certain exhibits which were excluded as hearsay should have been admitted. Debtors point to no hearsay exception, or reason why the exhibits were not hearsay, to justify their admission into evidence. Nor did debtors make any such argument to the Bankruptcy Court. Finally, because these exhibits are not designated as part of the record, this court is is unable to construct debtors' hearsay argument for them.

Debtors contends that the Bankruptcy Court erred by refusing to continue the hearing, to provide debtors with additional time to secure the presence of an expert witness. The trial court is vested with control over its own docket, and whether or not to grant continuances are within the sound discretion of the trial court.

Debtors contend that the Bankruptcy Court improperly converted their Chapter 11 case to a

Chapter 7 case. The Bankruptcy Court may issue necessary orders on its own motion. 11 U.S.C. 105(a). A Chapter 11 case may be converted to a Chapter 7 case if the court finds there is a diminution of the estate and a lack of reasonable likelihood of rehabilitation. 11 U.S.C. 1112(b)(1). That finding is one of fact on a core proceeding, and is subject to review only on a clearly erroneous standard. 28 U.S.C. 158. The evidence before the Bankruptcy Court supports its conclusion that the debtor's rehabilitation was unlikely, and that the estate was losing value, to the detriment of the creditors. Further, debtors' attorney consented to conversion after debtors' plan was not confirmed.

Further, insofar as the debtors' appeal challenges the sale of debtors' property, debtors' appeal is moot. 11 U.S.C. 363(m) provides that the appeal of a court order

approving a sale of the debtors' property can not effect the validity of a sale to a good faith purchaser unless the sale is stayed pending appeal. If an appellant fails to obtain a stay, the appeal must be dismissed as moot. In re Vetter Corp., 724 F.2d 52, 55-56 (7th Cir. 1983) (citing In re Ball Air Associates, Ltd., 706 F.2d 301, 304-05 (10th Cir. 1983) (interpreting former Fed.R. Bank.P. 805).

Debtors contend that the instant appeal falls within the exception to the stay requirement applicable to bad faith transactions. It is well established that a district court may not review issues not raised in the Bankruptcy Court or designated for appeal. MortgageAmerica Corp. v. Bach Halsey Stuart Shields, Inc., 789 F.2d 1146, 1151 (5th Cir. 1986); Garfinkle v. Levin, 460 F.Supp. 670, 672 (S.D.N.Y. 1978); see also Southwest Forest Indus., Inc. v. Sutton, 1989 U.S. App. LEXIS

1515 (10th Cir. Feb 10, 1989) (appeal limited to issues noted); Associated Press v. Cook, 513 F.2d 1300 (10th Cir. 1975)(appeal limited to issues raised at trial). Here, appellants' statement of issues does not raise the issue of bad faith, and the record does not indicate that appellants litigated the issue of bad faith below.

Appellants' remaining contentions on appeal are without merit.

ACCORDINGLY, the decisions of the United States Bankruptcy Court are AFFIRMED.

Done this 31 day of July, 1989 at Denver, Colorado.

By the Court:

ss

Sherman G. Finesilver, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-F-428
Bankruptcy Case No. 86 B 476 G

IN RE: RONALD W. GREGORY and DOROTHY L. GREGORY,
Debtors,

RONALD W. GREGORY and DOROTHY L. GREGORY,
Appellants,
vs.
FRONTIER MATERIALS, INC., UNITED STATES TRUSTEE, ST. VRAIN LEFT HAND WATER CONSERVANCY DISTRICT, FRONTIER AIRLINES FEDERAL CREDIT UNION, FIRST FEDERAL SAVINGS BANK OF OKLAHOMA, GRANGE MUTUAL LIFE COMPANY, BOULDER COUNTY and E.H.M.G. CONSULTANTS,
Appellees.

Case No. 89-F-148
Bankr. No. 86 B 0476 A

In re: RONALD W. GREGORY amd DOROTHY L. GREGORY,
Debtors.

RONALD W. GREGORY and DOROTHY L. GREGORY,

Appellants,
vs.
UNITED STATES TRUSTEE, ROSS J. WABEKE, Trustee of Estate, FRONTIER AIRLINES FEDERAL CREDIT UNION, FRONTIER MATERIALS, INC.,
Appellees.

JUDGMENT

PURSUANT TO an in accordance with the

Memorandum Opinion and Order entered July 31, 1989, by the Honorable Sherman G. Finesilver, Chief Judge, it is hereby

ORDERED that the decisions of the United States Bankruptcy Court are AFFIRMED.

DATED at Denver, Colorado, this 31st day of July, 1989.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

by: _____
Stephen P. Ehrlich
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: RONALD W. GREGORY In re: DOROTHY L. GREGORY, Debtors.	)	
RONALD W. GREGORY; DOROTHY L. GREGORY, Appellants, v. U. S. TRUSTEE; ROSS J. WABEKE, Trustee of the Estate, FRONTIER AIRLINES FEDERAL CREDIT UNION; GRANGE MUTUAL; FRONTIER MATERIALS, INC. Appellees.	)	89-1264 89-1265

ORDER

Filed November 27, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, ???CK, BRORBY, Circuit Judges.

This matter comes on for consideration of appellants' suggestion for rehearing en banc, which the court treats as a petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that

rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Judge Ebel is recused.

Entered for the Court

ss

ROBERT L. HOECKER, Clerk

Title 11

11 USC 362

"(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title,...operates as a stay, applicable to all entities, of --

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;..." [Emphasis added]

11 USC 704(7)

"The trustee shall --

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;"

11 USC 1109(b)

"A party in interest, including the debtor, the trustee, a creditor's committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter."

APPENDIX "D-2"

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM, 1991

RONALD W. GREGORY and DOROTHY L. GREGORY,

Petitioners,

vs.

FRONTIER MATERIALS, INC.; U. S. TRUSTEE; ST. VRAIN LEFT HAND WATER CONSERVANCY DISTRICT; FRONTIER AIRLINES FEDERAL CREDIT UNION; FIRST FEDERAL SAVINGS BANK OF OKLAHOMA; GRANGE MUTUAL LIFE CO.; BOULDER COUNTY, COLORADO; E.H.M.G. CONSULTANTS; ROSS J. WABEKE, Interim Trustee of Estate,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Ronald W. Gregory
Dorothy L. Gregory
Pro Se
c/o J. Bayne
P.O. Box 29773
Thornton, CO 80229-0773

Dated: April 25, 1991

15 USC 15(a)

"Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only -

(1) whether such person is the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or

otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying litigation or increasing the cost thereof."

APPENDIX "E-2"

Title 18

18 USC 153

"Whoever knowingly and fraudulently appropriates to his own use, embezzles, spends, or transfers any property or secretes or destroys any document belonging to the estate of a debtor which came into his charge as a trustee, custodian, marshal, or other officer of the court, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

18 USC 154

"Whoever, being a custodian, trustee, marshal, or other officer of the court,knowingly purchases, directly or indirectly, any property of the estate of which he is such officer in a case under title 11; or

Whoever being such officer, knowingly refuses to permit a reasonable opportunity for the inspection of the documents and accounts relating to the affairs of estates in his charge by parties in interest when directed by the court to do so --

Shall be fined not more than $500, and shall forfeit his office, which shall thereupon become vacant."

18 USC 241

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws

of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with the intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured -

They shall be fined no more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or life.

18 USC 242

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

* * *

18 USC 245(b)

"Whoever, whether or not acting under the color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with

(2) any person because of his

race, color, religion or national origin and because he is, or has been

(B) participating in or enjoying any benefit, service, privilege program, facility or activity provided or administered by a State or subdivision thereof;

(C) applying for or enjoying employment, or any prerequisite thereof, by any private employer or any agency of any State or subdivision thereof,...; shall be fined not more than $1,000.00, or imprisoned not more than one year, or both;"

18 USC 1961

"(1) "racketeering activity" means...(D) any offence involving fraud connected with a case under title 11..."

18 USC 3057

(a) "Any judge...having reasonable grounds for believing that any violation under...other laws of the United States relating to insolvent debtors...or reorganization plans has been committed ...shall report to the...United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed..."

"(b) "The United States attorney thereupon shall inquire into the facts and report thereon to the judge, and if appears probable that any such offense has been committed, shall without delay, present the matter to the grand jury, ..."

18 USC 3109

"The officer may break open any outer or inner door or window of a house, or any part or a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

APPENDIX "F-4"

AMENDMENT I TO THE UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and petition the Government for a redress of grievances.

APPENDIX "G"

AMENDMENT IV TO THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX "H"

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX "I"

AMENDMENT VII TO THE UNITED STATES CONSTITUTION

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

AMENDMENT VIII TO THE UNITED STATES CONSTITUTION

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX "K"

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

Section 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "L"

APPENDIX M

August 21, 1986

Re: Frontier Materials/Gregory - Counteroffer of Settlement

Gentlemen:

In accordance with our face-to-face settlement discussions of August 14, 1986, I have prepared the following redraft of our earlier settlement proposal. I believe that you will find the revised terms to be in accord with our oral understandings:

1. Gregory will pay to Frontier the sum of $215,000.00 over a five year period with the payments made as follows:

a. $50,000.00 within the sooner of the following:

(i.) ten(10) days after the issuance to Gregory of the permits for the Gregory gravel operation; or

(ii.) 120 days after approval of the Settlement Agreement by the Bankruptcy Court,

provided that Frontier has not delayed hereunder in meeting its obligations to transfer permits to Gregory, such period to be extended equivalent to any period of delay in excess of that provided in Section 9 below.

b. $50,000.00 within one year following the first payment;

c. $25,000.00 within the year following the second payment;

d. $25,000.00 within the year following the third payment;

e. $25,000.00 within the year following the fourth payment;

f. A balloon payment of all principal and interest which remain due on or before the fifth anniversary date of the first payment.

2. The portion of the $215,000.00 which is paid by deferred payments as described in paragraph 1 shall accrue monthly interest at the prime rate as set by the Colorado National Bank

in Denver, Colorado.

3. Gregory may repay the $215,000.00 or any portion of said $215,000.00 with accrued interest at any time without penalty. In the event that Gregory prepays the entire $215,000.00, Gregory shall be relieved of all obligations to Frontier hereunder save and except the right of first refusal granted below.

4. The $215,000.00 due from Gregory to Frontier pursuant to this Settlement shall be secured by a deed of trust which will encumber the subject Gregory sand and gravel in Hygiene, Colorado. The deed of trust will be junior to that lien now held of record by Grange Mutual Life Co.

5. In the event that Gregory defaults under any of the settlement provisions, Frontier shall have the rights enumerated below. "Default" shall be defined as a violation of this agreement which Gregory has failed to cure after

thirty (30) days written notice of the default. The notice shall specify in detail the nature of the default, and shall be effective upon the date placed in the United States mail, postage prepaid, certified, return receipt requested.

a. To foreclose its deed of trust which encumbers the subject property. If Gregory fails to redeem during the period provided by law, the Gregory/Frontier mining lease shall merge with the property title upon the date of issuance of the Public Trustee's Deed, and royalties paid under the lease shall cease on such date; and/or

If Gregory redeems during the period provided by law, The Mining Lease between Frontier and Gregory shall be deemed to be reinstated and in effect, and Frontier may enter the property to commence mining operations pursuant to the terms of the Mining Lease, and Gregory shall own the property free of the deed of trust, but subject to the mining lease.

[The stated intent of the parties is that Gregory shall have "one shot" to mine the property under this stipulation; if Gregory defaults and foreclosure commences, a redemption by Gregory will not re-instate his right to mine.]

b. Frontier may elect to enter the property to commence mining operations pursuant to the Frontier/Gregory Mining Lease of July 1, 1983, which mining lease is agreed by the parties herein, and for the purposes of this settlement only, to be valid and enforceable, with Frontier vested with possessory rights contingent only upon the default of Gregory, and further provided:

(i.) If Frontier elects to commence mining operations after any uncured default:

(1) Gregory shall be relieved of any obligation to pay Frontier any amounts yet unpaid under this agreement.

Any amounts paid to Frontier prior to the exercise of its rights under paragraph 5b. shall be the sole property of Frontier and may not be recovered by Gregory.

(2) If Frontier has initiated foreclosure, but enters the property prior to the expiration provided for by law, the foreclosure proceeding shall be terminated by Frontier, and any certificate of purchase cancelled, and the parties shall revert to their relationship established under this Agreement and the Mining Lease of July 1, 1983.

(3) Except in the issuance of a Public Trustee's deed to Frontier, royalties shall be paid as provided under the mining lease after entry of the subject property by Frontier to commence mining operations.

(4) If Frontier elects to foreclose, but such foreclosure is redeemed by Gregory, Frontier shall have the right to enter

and mine the property pursuant to the terms of the Mining Lease of July 1, 1983, Gregory's property title to be subject to such Mining Lease.

c. In the event Frontier elects to pursue mining operations pursuant to 5b. above according to the terms of the Frontier/Gregory lease, Gregory agrees to execute any documents required by Frontier to obtain a retransfer of the permits and otherwise commence mining operations, such re-transfer to occur within three (3) days after written request by Frontier.

In the event that Frontier exercises its rights under paragraph 5b., Gregory shall abandon all mining operations and vacate the premises except for his home and the adjacent tract as set forth in paragraph 6 below. If Gregory does not so abandon and vacate, Frontier shall be granted relief from stay and

immediately entitled to commence an action to evict Gregory who is deemed to be holding possession of the property for the benefit of Frontier until Frontier is fully paid.

6. Gregory shall remain liable to the first lienholder for all amounts due on his home and a 17 acre tract surrounding the home which shall be retained by Gregory except that upon completion of the first two payments by Gregory under this Agreement, Frontier agrees to be fully liable for any liability to the first lienholder even in the event of a subsequent default by Gregory. In the event of a default by Gregory and if Frontier chooses to foreclose its deed of trust, Gregory shall have the right to obtain from Frontier a deed to the Gregory home and adjacent structures and the 17 acre tract, and to possession thereof, free and clear of all existing liens and encumbrances (being those of the Grange first deed of trust on the

Gregory Tract at the earliest possible date, and until release, to indemnify Gregory in writing against the lien of the first deed of trust.

In the event that Gregory defaults prior to making one or both of the first two payments required herein, and Frontier elects to foreclose its deed of trust, Gregory shall have the ability to take advantage of the hold harmless agreement contained in the previous paragraph by paying to Frontier the defaulted amount (whether $50,000 or $100,000, whichever is applicable) prior to the expiration of the six (6) month redemption period provided by law.

7. In the event that Frontier begins mining operations on the subject property pursuant to this Agreement, the parties further agree that Gregory will not unreasonably restrict or impede Frontier's mining efforts by virtue of his continued interest in and ownership of his home and retained acreage provided that Frontier's

mining activities are in accord with the current approved mining plan.

8. Frontier shall neither interfere with nor impede Gregory's efforts to start up and to pursue mining operations of a sand and gravel mine on his subject property and Frontier shall not interfere with nor impede Gregory's mining operations once the mining operations have been commenced.

9. Frontier shall make all information in its possession available to Gregory in obtaining permits for commencement of mining operations for the subject property and shall neither interfere with nor impede Gregory's efforts to obtain the necessary permits for the sand and gravel mine including any attempt by Gregory to obtain approval of different access haul routes. Frontier shall comply with Gregory's reasonable requests to sign documents necessary to effect a transfer of any existing permits for the sand

and gravel operation on the Gregory property to Gregory. Frontier shall execute all documents necessary to accomplish transfer of permits, succession of operator or otherwise within three days of the written request of Gregory, including, upon the request of Gregory, any agreements with surrounding landowners.

Frontier states its preference not to assign permits until Gregory obtains the necessary approvals from Boulder County and the Colorado Mined Land Reclamation Board, but agrees to so transfer in the event that Gregory or Gregory's counsel deems transfer necessary for Gregory to obtain the required change of operator approvals from the County, the State, or other affected agencies.

The terms "interference" or "impede" shall included any efforts by Frontier to delay mine startup or operation, to delay acquisition or transfer of permits, to organize opposition to

the mining operation, whether through legal action or through the actions of the officers, agents, employees or persons under the direction of or acting at the request of Frontier.

10. In the event that the Settlement Agreement with Frontier is incorporated into any Chapter 11 Plan proposed by Gregory and no default has occurred thereunder, Frontier agrees that the Settlement Agreement will be deemed to constitute adequate protection of Frontier's interest and claims as lessee and lienholder.

11. Gregory individually, as a general partner in any limited or general partnership, or as majority shareholder in any corporation, is the only entity with the right to conduct sand and gravel mining operations on the subject property for the five-year period following the execution of the Settlement Agreement. Nothing herein shall prevent Gregory from utilizing commercial sub-contractors to perform contract

tasks upon the site, including with specificity the operation of a contract crushing facility. The parties state that it is their intent under this section that Gregory not have the ability to lease or to sublease the Property to a competitor of Frontier during the first two (2) years of this Agreement, and that he be able only to lease, sublease or sell the property subject to Frontier's right of first refusal, as defined below.

a. After two years following the date of the Settlement Agrement, Gregory will have the right to lease or sublease the subject property for sand and gravel mining operations; provided that Frontier has a first right to lease the subject property on the same terms and conditions as any bona fide offer for lease which is received by Gregory.

Gregory shall have the right to sell the property at any time after the date hereof,

subject to Frontier's right of first refusal to purchase. The terms of Frontier's first right of refusal to lease or purchase are as follows:

(i.) If Frontier exercises its option to purchase or lease the property as set forth above, Frontier may deduct from the lease or purchase price that portion of the $215,000.00 which remains unpaid pursuant to the Settlement.

(ii.) Gregory shall present to Frontier in writing any bona fide offer to lease or purchase which he intends to accept and then Frontier shall have a period of 20 days to notify Gregory in writing of its intent to exercise it Right of First Refusal, with closing to occur within thirty (30) days after notification to Gregory of such exercise. Frontier shall have the right to verify the bona fide nature of any offer and it is agreed between the parties that any offer must pay off Frontier at closing in full under this

Settlement Agreement in order for such offer to be accepted by Gregory. In the event that Frontier does not exercise its Right of First Refusal , Gregory shall be free for a period of ninety (90) days to close with the third party making the offer on the terms and conditions offered by Gregory to Frontier.

(iii.) In the event that Frontier does not exercise its right of first refusal, this Agreement and the Frontier/Gregory lease shall be cancelled at closing, and Frontier shall be paid contemporaneously therewith any amounts due hereunder, with accrued interest, if any. The parties agree to the execution at closing of any documents necessary to accomplish the same.

12. The Settlement Agreement is contingent upon the prior approval of the Settlement Agreement by the Bankruptcy Court in the Gregory bankruptcy case.

13. Frontier shall execute an assignment to Gregory the existing easement agreement between Frontier and Western Paving. This Settlement Agreement shall be contingent upon dismissal of the lawsuit in Division I Water Court upon the terms provided at paragraph 14 below.

14. The Settlement Agreement shall be binding on the parties' heirs and successors, The parties agree to the dismissal of all pending actions between them, including the suit in Division I Water Court against Western Paving. The parties further agree to a mutual release of all claims arising under this Agreement.

The lawsuit in Division I Water Court shall be resolved as follows, by stipulation in such Court.

a. Gregory, Western and Frontier shall agree to the dismissal of the lawsuit with prejudice, subject only to the terms of this

Settlement.

b. Frontier shall agree to the assignment of the easement to Gregory as provided in Paragraph 13 above.

15. Gregory will honor all agreements which Frontier has made with Gregory's immediate neighbors regarding conduct of the sand and gravel mining operations on Gregory's property. Frontier shall provide copies of all such agreement to Gregory and Gregory shall have a three day period to review the agreements and determine whether to proceed with the Settlement Agreement. In the event that after reviewing the agreements with the neighbors, Gregory chooses to not enter into the settlement with Frontier, and any settlement documents which have been executed will be null, void and of no effect.

Gentlemen, I look forward to hearing from you in the near future regarding this counteroffer of settlement. It will remain in

effect for a period of five (5) days from the date hereof. Should you be in need of further clarification, do not hesitate to call me at any time.

Very truly yours,
RUBNER & KUTNER, P.C.

ss

Lee M. Kutner

The foregoing settlement offer has been reviewed and approved by Ronald W. Gregory.

ss - Ronald W. Gregory

The foregoing settlement offer has been reviewed and approved by Frontier Materials, Inc.

ss - R. A. DeManche

Pres.

APPENDIX N

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

Bankruptcy No. 86 B 0476 G

IN RE:	)
	)
RONALD W. GREGORY	)ORDER APPROVING
SSN: 520-26-3693, and	)SETTLEMENT
DOROTHY L. GREGORY,	)AGREEMENT
SSN: 525-44-8580,	)
Debtors.	)

THIS MATTER having come before the Court on the Application for Approval of Settlement by and between Debtors and Frontier Materials, Inc., it appearing that notice has been given to creditors and parties in interest and no objections having been filed, the Court having reviewed the Settlement and being fully advised,

ORDERS

That the Settlement dated August 21, 1986 by and between the Debtors and Frontier Materials, Inc. is hereby approved; and it is

FURTHER ORDERED

That the Debtors are hereby authorized to execute documents and take such actions as may be necessary and convenient to consummate the Settlement.

DONE and entered this 8 day of September, 1986 at Denver, Colorado.

ss - C. E. Matheson

Judge Charles E. Matheson
Bankruptcy Judge

SUMMARY OF ACTS BY FRONTIER MATERIALS, INC. NOT IN ACCORDANCE WITH SETTLEMENT AGREEMENT OF AUGUST 21, 1986

1. Section 15. Failed to provide copies of all neighbor agreements regarding of the sand and gravel operations within three days of Agreement date.

2. Section 15. Entered into a 'post settlement' written agreement with neighbor requiring Petitioners to perform in a manner causing extra financial costs and labor in April 1987.

3. Section 9. Failed and refused to execute all documents and transfer permits, etc. within three days of Petitioners written request of September 9, 1986. Multiple written requests were made and 40 to 120 days passed before compliance.

4. Sections 8 and 9. "Interference" and "Impede" intent conducted by:

a. Fraudulent misrepresentations as to permits held and as to the 'condition' of said permits;

i. Boulder County permit in danger of revocation due to failure to perform according to 'commitments of record' - required Petitioners 90 days, three public hearings and additional financial commitments to prevent revocation;

ii. no Colorado State water discharge permit;

iii. no Boulder County access road permit;

iv. no Boulder County floodplain development permit;

v. no Colorado State monitoring wells permits;

vi. no well permit as required by Colorado State for open pit mining;

vii. no emissions permit as required by Colorado State;

viii. no scalehouse permit as issued by Boulder County.

b. Commencement on December 23, 1986 of action against Petitioners to force performance of required acts previously accomplished by Petitioners pursuant to Section 14:

i. release of Boulder County District Court 'breach of contract' action as released on December 10, 1986;

ii. release of Weld County Water Court 'water right destruction' action; as released in October 1986;

iii. executing the second deed of trust which was accomplished in November 1988.

c. 40 Day delay in transferring valid 'permit';

d. Personal neighbor visits to organize neighbor "opposition" in September 1986;

e. Attorney request to cancel Boulder County Permit in September 1987;

f. Cancellation of 'mining bond' with Colorado State Mined Land Reclamation Board in April 1987 requiring the posting by investors of $31,554 which, unless the

bond were replaced, the mining permit would be cancelled and the defeat of the plan of reorganization.

g. Commencement of action in January 1987 for Petitioner 'default' in first $50,000 payment when, pursuant to Section 1.a.(ii.), said payment was not due by reason of Frontier delays;

h. Commencement in February 1987 of action to 'compel' Petitioner Mrs. Gregory to execute Mortgage although Section 4. referred to Gregory in the singular and further, Mrs. Gregory did not execute said Settlement Agreement nor were any provisions contained in said Agreement for her signature.

i. Refusal in April 1988 to accept the second installment of $50,000 when Section 3. states that any portion can be paid at any time without penalty thereby defeating Section 6. for securing 17 acres and improvements.

5. Section 10. Continued unabated opposition to, and interference with, Petitioners plan of reorganization and efforts relating thereto notwithstanding its admission that the Settlement Agreement constituted adequate protection of their interests.

a. Filed objection to Disclosure Statement in December 1987;

b. Objected to Confirmation on February 26, 1988.

APPENDIX "O-3"

Bankruptcy Rule 2018(a)

"In a case under the Code, after hearing on such notice as the court directs and for cause shown, the court may permit any interested entity to intervene generally or with respect to any specified matter."

Bankruptcy Rule 5004(a)

"A bankruptcy judge shall be governed by 28 USC 455, and disqualified from presiding over the proceeding or contested matter in which the disqualifying circumstance arises or, if appropriate, shall be disqualified from presiding over the case."

APPENDIX "P"

Federal Rules of Evidence

FRE 103. "(a) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which the questions were asked.

(b) The court may add any other and further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(d) Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

FRE 602 " A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses."

APPENDIX "Q-1"

FRE 803. "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(24) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact;

(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence. However a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare and meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant."

APPENDIX "Q-2"

APPENDIX R

UNITED STATES BANKRUPTCY COURT
DISTRICT OF COLORADO

BRADFORD L. BOLTON
Clerk
400 Columbine Building
1845 Sherman Street
Denver, Colorado 80203

March 17, 1988

TO THE CLERK, U.S. DISTRICT COURT

In re: RONALD W. GREGORY AND DOROTHY L. GREGORY
Bankr. Case No. 86 B 0476 G

Dear Sir:

Pursuant to Rule 46, Local Rules of Bankruptcy Procedure, pleased be advised of the following:

[x] Notice of Appeal/Motion for Leave to Appeal was not timely filed as specified in B.R. 8002. Appeal was filed 3-15-88, more than ten days from the date the Judgment was entered on docket.

Sincerely,

BRADFORD L. BOLTON, Clerk

ss - Lorraine A. Robinson
By_____
Deputy Clerk

OPPOS

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CASE NO. 91333

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RONALD W. GREGORY and DOROTHY L. GREGORY,

Petitioners,

vs.

FRONTIER MATERIALS, INC.; U.S. TRUSTEE; ST. VRAIN LEFT HAND WATER CONSERVANCY DISTRICT; FRONTIER AIRLINES FEDERAL CREDIT UNION; FIRST FEDERAL SAVINGS BANK OF OKLAHOMA; GRANGE MUTUAL LIFE CO.; BOULDER COUNTY, COLORADO; E.H.M.G. CONSULTANTS; ROSS J. WABEKE, Interim Trustee of Estate,

Respondents.

RESPONSE OF ROSS J. WABEKE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROSS J. WABEKE
DeGOOD, BALL, EASLEY, WABEKE & BRUMMET
COUNSEL OF RECORD FOR
ROSS J. WABEKE, BANKRUPTCY TRUSTEE
325 EAST 7TH STREET
LOVELAND, COLORADO 80537
(303) 667-2131

I. STATEMENT OF ISSUES PRESENTED

A. Whether the United States Bankruptcy Court for the District of Colorado erred in finding Appellants', (hereinafter referred to as "Petitioners") Chapter 11 Plan unfeasible and in finding a diminution of Petitioners' Chapter 11 bankruptcy estate and the lack of any reasonable likelihood of rehabilitation in the Court's conversion of the case to a Chapter 7 liquidation proceeding;

B. Whether the United States Bankruptcy Court for the District of Colorado abused its discretion in approving the Chapter 7 bankruptcy Trustee's Application to sell certain property of the estate;

C. Whether the Appeal by the Petitioners involving the United States Bankruptcy Court's authorization to the Chapter 7 Trustee to sell certain property of the estate has been made moot by the

failure of the Petitioners to obtain a stay related to the sale and the successful consummation of the sale to a good faith purchaser;

D. Whether any of the remaining issues or contentions raised by the Petitioners are matters which are properly before the United States Supreme Court and the Petitioners' Petition for Writ of Certiorari.

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A. Denial of Confirmation and Conversion to Chapter 7.

B. Sale of Property by the Chapter 7 Bankruptcy Trustee.

1. Standard of Review.

2. Discussion.

C. Appeal of Order Approving Sale is Moot.

1. Standard of Review.

2. Discussion.

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II. TABLE OF AUTHORITIES

CASES	PAGE WERE CITED
Albany Partners, Ltd. v. Westbrook (In Re: Albany Partners, Ltd. 749 F 2d 670 (9th Cir. 1984)	41
Bel Air Associates, Ltd. 706 F 2d 301 (10th Cir. 1983)	52
In Re: Herd, 840 F 2d 757 (10th Cir. 1988)	41 & 49
In Re: J.R. McConnell, 82 B.R. 43 (Bankr. Texas 1987)	49
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Section 1112(b)(1) 48

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III. OPINIONS AND JUDGMENTS IN THE COURTS BELOW

The opinions of the United States Court of Appeals for the Tenth Circuit appears on Appendix A in the Petition. That opinion affirmed a decision by the Federal District Court for the District of Colorado. The United States District Court for the District of Colorado opinion appears in Appendix B to the Petition which decision affirmed the United States Bankruptcy Court's decision converting the Petitioners' Chapter 11 bankruptcy proceeding to a proceeding under Chapter 7 and affirmed the United States Bankruptcy Court decision authorizing the sale of certain real property of the Petitioners.

IV. STATEMENT OF THE CASE

A. Nature of the case; Proceedings and Deposition of the United States Bankruptcy Court for the District of Colorado, United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit.

Denial of confirmation of plan and conversion to Chapter 7.

(District Court No. 88-F-428 and Tenth Circuit No. 89-1264).

The Petitioners, Ronald W. Gregory and Dorothy L. Gregory, commenced a voluntary proceeding under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Section 101 et seq., on January 21, 1986, in the United States Bankruptcy Court for the District of Colorado. In the course of the Chapter 11 proceedings, the Petitioners filed a Plan of Reorganization. Objections to Confirmation of the Plan were filed by Frontier Materials, Inc. (hereinafter referred to as "Frontier") and by Grange Mutual Life Company (hereinafter referred to

as "Grange"). An initial hearing on confirmation of the Petitioners' Plan of Reorganization scheduled to be held before the Bankruptcy Court on January 19, 1988, was adjourned on Petitioners' counsel's request based on their inability to go forward with proof of the plan's feasibility. On the adjourned date, February 26, 1988, evidence was taken and the plan presented for confirmation. At the conclusion of the hearing, the Bankruptcy Court, Honorable Charles E. Matheson presiding, denied confirmation of the plan and converted the Petitioners' Chapter 11 case to a Chapter 7 liquidation proceeding. The order denying confirmation and converting the case to Chapter 7 was entered on the Bankruptcy Court docket on March 2, 1988. On March 15, 1988, the Petitioners filed a Notice of Appeal to the United States District Court for the District of Colorado. The Appeal was assigned District Court Docket No. 88-F-428. On March 25,

1988, the District Court entered an Order dismissing the Appeal as untimely filed. On April 11, 1988, the Petitioners filed a Notice of Appeal to the United States Court of Appeal for the Tenth Circuit. The Court of Appeals assigned the Case Docket No. 88-1578. On February 22, 1989, the Court of Appeals entered its Order holding that the District Court erred in computing the time for filing the Appeal under the Bankruptcy Rules directing the Appeal reinstated and remanded to the District Court.

Sale of Property.

(District Court No. 89-F-148).

Following conversion of the Petitioners' case, Ross J. Wabeke (hereinafter referred to as "Trustee") was appointed Trustee of the Chapter 7 bankruptcy estate. The Trustee filed an Application with the Bankruptcy Court on August 31, 1988, to sell certain real property to Frontier in satisfaction of both Frontier and the Grange claims. The

Petitioners opposed the Trustee's Application and hearings were held before the Bankruptcy Court, Honorable Charles E. Matheson presiding on November 30, December 2, and December 9, 1988. At the conclusion of the hearings, the Bankruptcy Court granted the Trustee's Application and an Order was entered on December 14, 1988, approving the sale. On December 19, 1988 the Petitioners filed a Motion for a new trial and sought to vacate the Order that was entered on December 14, 1988 approving the sale, and the Order entered March 3, 1988, denying confirmation of the Plan of Reorganization and converting the Chapter 11 case to Chapter 7 liquidation proceeding. To support the Motions, Petitioners alleged that the presiding Bankruptcy Judge, Honorable Charles E.
Matheson, was biased. The allegations of bias were based upon perceived facial expressions of Court personnel and Frontier's attorneys and upon hand written

notes made by the Judge during the course of the sale proceedings. On January 3, 1989, Judge Matheson considered the allegations of bias and, although not agreeing with Petitioners' contentions, recused himself from further hearings in the case. The Order of Recusal was entered on January 4, 1989, and the Honorable Sidney B. Brooks was assigned to the case. On January 13, 1989, the Bankruptcy Court, Honorable Sidney B. Brooks presiding, considered Petitioners' Motions for a new trial and for an Order vacating the Orders of March 3, 1988 and December 14, 1988. The Bankruptcy Court denied the Petitioners' Motions. Thereafter on January 24, 1989 the Petitioners filed a Notice of Appeal to the District Court. The District Court assigned the Appeal Case No. 89-F-148. The Trustee by a Bankruptcy Trustee's Deed dated January 27, 1989 conveyed the property to Frontier.

On July 31, 1989, the United States District Court for the District of Colorado,

Honorable Chief Judge Sherman G. Finesilver presiding, issued a written Memorandum Opinion and Order affirming the decisions and Orders of the Bankruptcy Court in both pending Appeals, Case No. 88-F-428 and 89-F-148. Thereafter on August 14, 1989, Petitioners filed a Notice of Appeal to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals has assigned the Appeal Case No. 89-1264 and 89-1265.

On August 25, 1990, the United States Court of Appeals for the Tenth Circuit, Judges McKay, Seymour and Brorby, issued a written Order and Judgment affirming the decision of the United States District Court for the District of Colorado in both pending Appeals (under Court of Appeals Case No. 89-1264 and 89-1265). The Order and Judgment indicated that the issues raised by the Petitioners in their Briefs regarding breach of settlement agreement and violations of constitutional rights during the Bankruptcy Court proceedings were not before the Court

because they were not properly argued to the Bankruptcy Court. On or about October 9, 1990, the Petitioners filed their Petition for Re-Hearing En Banc and on November 27, 1990 the United States Court of Appeals for the Tenth Circuit denied the Petition for Re-Hearing En Banc.

On April 26, 1991 the Petitioners filed their Petition for Writ of Certiorari with the United States Supreme Court.

Other Proceedings and Issues.

In the Court of Appeals, the Petitioners requested and the Court allowed Case No. 89-1264 and 89-1265 to be consolidated. The Petition for Writ of Certiorari is properly directed at those two proceedings only. In both the Motion for Consolidation filed by the Petitioners in the Court of Appeals and the Brief filed by the Petitioners thereafter, it is reflected that the cases of the District and Bankruptcy Courts, other than those treated in the District Court Order of July 31,

1989, are sought to be addressed to the United States Court of Appeals for the Tenth Circuit and therefore also addressed to the United States Supreme Court in this Petition for Writ of Certiorari. The additional District Court case numbers referenced or referred to in some manner by the Petitioners found in their Petition for Writ of Certiorari are as follows:

1. District Court Case No. 89-F-818 was a Motion filed by the Petitioners to transfer their case from the Bankruptcy Court for the District of Colorado to the Bankruptcy Court for the District of Wyoming and to remove the Trustee. This matter originated in an Order of the Bankruptcy Court entered April 15, 1989, denying the Petitioners' Motion to transfer the bankruptcy case to the State of Wyoming and to remove the Trustee. The Bankruptcy Court Order of April 25, 1989 was Appealed by the Petitioners to the District Court. The District Court by Order entered

November 3, 1989 in Case No. 89-F-818 dismissed the Appeal with Prejudice due to the Petitioners' failure to prosecute. The dismissal resulted from Petitioners' non-compliance with an Order of the District Court to file an opening Brief by October 23, 1989. The Order directing the filing of a Brief had been issued on Petitioners' plea to vacate an earlier dismissal for failure to file a Brief and for failure to appear at a Show Cause Hearing. The resulting District Court Order of November 3, 1989 dismissing the case with prejudice, has not been appealed to this Court and the issues raised with respect thereto, not being properly before this Court, will not be addressed in this Brief.

2. District Court Case No. 89-F-1404 originates from an Order of the Bankruptcy Court entered August 7, 1989 imposing sanctions against the Petitioners for failure to abide by certain Bankruptcy Court Rules. The Bankruptcy Court's Order

of August 7, 1989 was appealed by the Petitioners to the District Court. The District Court, by order entered October 31, 1989 in Case No. 89-F-1404 dismissed the appeal with prejudice, due to the Petitioners' failure to prosecute. The dismissal resulted from the Petitioners' non-compliance with an order to show cause and failure to appear at the show cause hearing. The resulting District Court Order dismissing the appeal with prejudice has not been Appealed to this Court and the issues raised with respect thereto, not being properly before this Court, will not be addressed in this Brief.

3. District Court Case No. 90-F-128 is a matter that originated in an Order of the Bankruptcy Court entered on January 9, 1990. The Orders so appealed had to do with the sale of gravel mining equipment and other Orders apparently entered on that same date. The Petitioners appealed the Bankruptcy court Order and on

March 1, 1990 the District Court dismissed the case with prejudice. The resulting District Court Order dismissing the appeal has not been appealed to this Court and the issues raised with respect thereto, not being properly before this Court will not be addressed in this Brief.

4. District Court Case No. 91-C-811 originates with a Bankruptcy Court Order of April 29, 1991 granting the Trustee's Motion for an Order Limiting the Debtors' Request for Access to the Trustee's Files. The Petitioners appealed the Bankruptcy Court Order granting said Motion. On June 21, 1991 the District Court dismissed the Petitioners' Appeal with prejudice for failure to prosecute. The resulting District Court Order has not been Appealed to this Court and the issues raised with respect thereto, not being properly before this Court will not be addressed.

5. A second Motion by the Petitioners to move the case to the State of

Wyoming and to remove the Trustee and Judge Sidney B. Brooks resulted in an Order of the Bankruptcy Court denying said Motion. Said Order of the Bankruptcy Court has not been appealed to the District Court and therefore is not properly before this Court and will not be addressed.

6. A Bankruptcy Court order granting a declaratory judgment to the Trustee in his Complaint to have a certain Mined Land Reclamation Bond declared to be property of the bankruptcy estate was never appealed by the Petitioners and therefore is not properly before this Court and will not be addressed.

B. Statement of Facts.

The Petitioners, Ronald W. Gregory and Dorothy L. Gregory, filed a voluntary Petition seeking relief under Chapter 11 proceeding, the Petitioners sought to reorganize and pay creditors with the profits from a sand and gravel business proposed to be operated on land owned by the

Petitioners in Boulder County, Colorado. The Petitioners proposed means for reorganization was set forth in a plan filed with the Bankruptcy Court on December 3, 1987. (Bkpt. Ct. Doc. #182). Frontier objected to the Petitioners' Plan of Reorganization. (Bkpt. Ct. Doc. #193 and #194). Grange, a secured creditor holding a first Deed of Trust on the land proposed by the Petitioners to be used for the sand and gravel mining operation, further requested that the Bankruptcy Court convert the Petitioners' reorganization proceeding to a proceeding under Chapter 7 for liquidation. (Bkpt. Ct. Doc. #194). A hearing on confirmation of the Petitioners' Plan for Reorganization was initially scheduled to be held before the Bankruptcy Court on January 19, 1988. On request of Petitioners' counsel, made due to an admitted inability to prove feasibility of the plan, the confirmation hearing was continued until February 26, 1988. (Bkpt.

Ct. Tr. Volume II and Volume IV). At the conclusion of the hearing on confirmation held February 26, 1988, the Bankruptcy Court determined that the Plan of Reorganization proposed by Petitioners was not feasible and, therefore not confirmable. (Bkpt. Ct. Tr. 22688 Volume IV, pp 56-59). Further, the Petitioners' Chapter 7 case had been pending for two years, the value of the estate's assets were diminishing, and a successful rehabilitation and reorganization was not likely. Based upon the record, the motion of Grange to convert the case to a Chapter 7 proceeding, and the apparent consent of the Petitioners' attorney to conversion the Bankruptcy Court entered its Order converting the Chapter 11 proceeding to a proceeding under Chapter 7 of the Bankruptcy Code on March 2, 1988. (See Bkpt. Ct. Tr. 22688 Volume 4, pp 65-69; Bkpt. Ct. Doc. #206).

Shortly after conversion of the bankruptcy case to a proceeding under

Chapter 7, Ross J. Wabeke was appointed Interim Trustee to administer the assets of the Petitioners' estate. At the Meeting of Creditors held pursuant to 11 U.S.C. Section 341 no other person was elected as Trustee and Ross J. Wabeke became the Trustee. Thereafter, in the course of performing his duties, the Trustee negotiated a sale of the Petitioners' property in Boulder, County, Colorado to Frontier. (Bkpt. Ct. Doc. #253). In consideration of the conveyance to Frontier, Frontier and Grange released their claims against the Petitioners' estate and Frontier assumed the indebtedness to Grange secured by the first Deed of Trust. The Bankruptcy Court, after considering Objections posed by the Petitioners to the sale (Bkpt. Ct. Doc. #263), determined that the proposed transaction was in the best interest of the estate and entered its Order approving the sale on December 14, 1989. Furthermore, the Bankruptcy Court found that the actual value to the estate of the sale

was approximately 1.15 million dollars. (Bkpt. Ct. Doc. #287, #288 and #289; Bkpt. Ct. Tr. 12288 Volume 5). The sale was consummated through the execution and delivery of a Trustee's Deed dated January 27, 1989. The Deed was recorded on January 30,1989 under Reception No. 965047, Film No. 1564, by the Boulder County, Colorado Clerk and Recorder.

The Petitioners raised in their Brief many other issues not properly before this Court. It is the position of the Trustee as Respondent that these matters do not have to be addressed because of the failure on the part of the Petitioners to Appeal them properly. These issues include alleged conversations between the Petitioners and their former counsel, allegations of bias on part of the Bankruptcy Court, a settlement agreement never made a part of the record before the United States District Court for the District of Colorado, alleged denial of access to the Courts and proceedings below

not before this Court on Appeal and alleged denial of the Petitioners right to due process.

C. Misstatements of Fact Included in the Petition for Writ of Certiorari.

The Petitioners have included in their Petition for Writ of Certiorari many misstatements of fact. These misstatements appear to be conclusions reached by the Petitioners that are not supported by any evidence; statements related to issues never presented to the lower Courts and therefore not relevant to this Petition and allegations of misconduct which have never been proved and which should have no part of this proceeding. The United States Supreme Court Rules specifically direct a Respondent to a Petition for Writ of Certiorari to point out such misstatements. The misstatements as made by the Petitioners are as follows: (All page number references are to the page number of the Petitioners' Petition for Writ of Certiorari).

1. Page 5 to 9, ending with the paragraph beginning "note". This section of the Petition is a re-cap of the assets owned by the Petitioners at the time they filed their Chapter 11 bankruptcy proceeding. The values indicated are nothing more than the Petitioners' own estimate of value, are inflated and have never been proven. The misstatements regarding those valuations are as follows:

a. There has never been any proof that the mineral value of the Petitioners' Boulder County, Colorado property was $1,970,000.00 and that the value of the water right destruction was from a minimum of $50,000.00 to $365,000.00 (page 6).

b. There has never been any proof that the value of the Petitioners' ranching property in Oklahoma was $350,000.00 in addition to home site development value, mineral rights, lime stone quarry or oil and gas production value

(page 7).

c. There was never any proof that the Petitioners' commercial property in Wyoming was worth $450,000.00 (page 8).

d. There has never been any proof that the Petitioners' Albany County, Wyoming property was worth $234,000.00 (page 9).

e. The Petitioners' statements that they were financially encumbered to an apparent total of $750,000.00 on assets totalling minimally from $2,735,000.00 to $5,143,000.00 is not true, has never been proven and is a gross distortion of reality. Valuations are Petitioners and are unsupported by any credible evidence whatsoever and are not part of this Petition for Writ of Certiorari. Simply stated the Petitioners are incorrect regarding their opinions of value.

2. Allegations regarding statements with counsel regarding the

perceived cost of reorganization are not a part of any record and are not properly before this Court (page 17).

3. Allegations regarding statements with counsel as to what was explained or not explained to the Petitioners regarding the effects of bankruptcy are not a part of any record before this Court and are not properly before this Court in this Petition for Writ of Certiorari.

4. Allegations regarding statements with counsel regarding demand for additional fees have never been raised, are not a part of the record and are not before this Court on review.

5. Allegations and statements regarding the Petitioners' understanding of the legal ramifications of signing a settlement agreement are not part of the record and are not properly before this Court.

6. Allegations that Frontier had

engaged in fraudulent misrepresentation are essentially scandalous in nature. There is no proof of such allegations in the record and there is certainly no proof anywhere in the record that Frontier acted viciously and maliciously. This matter is not properly before this Court and is unsupported in any event.

7. Allegations that Frontier violated and breached a settlement agreement are unsupported by any evidence and that matter is not properly before this Court for review.

8. Allegations that the Bankruptcy Court acted to defeat the term of the settlement agreement are not before this Court and are unsupported by any evidence of the record.

9. Beginning on page 23 and continuing on to page 24, the Petitioners attempt to state as fact that Judge Sidney B. Brooks and the Bankruptcy Court is biased against all Debtors. The allegations are

totally without merit are not part of the record and are not properly before this Court.

10. On pages 25 and 26 the Petitioners allege that the reversal by the United States Appellate Court for the Tenth Circuit of the District Court's Order dismissing their original Appeal as not being timely filed was not in time to present the loss of the most "valuable" property necessary for reorganization. Said reversal has nothing to do with the sale of the property the Petitioners claim to be most valuable. The clear facts supported by the record is that no Appeal Bond had been posted by the Petitioners. Furthermore, the United States Court of Appeals for the Tenth Circuit eventually affirmed the District Court decision which affirmed the Bankruptcy Court decision regarding the conversion of the Petitioners' Chapter 11 proceeding and the sale of the property in question.

11. On page 26, the Petitioners

allege that Ross J. Wabeke is not the properly appointed Trustee in this bankruptcy proceeding. The Petitioners have made these allegations numerous times in numerous proceedings regarding the bankruptcy case citing 11 U.S.C. Section 303(g). It has been pointed out to the Petitioners on numerous times that that particular Bankruptcy Code Section deals with involuntary bankruptcy proceedings. This case is not an involuntary proceeding. Rather, it is a voluntary Chapter 11 proceeding followed by a conversion to Chapter 7.

12. On page 27, the Petitioners state that on December 12, 1988 the Bankruptcy Court, Bankruptcy Court Judge Matheson, presiding allowed the sale of property for $845,000.00 which property was necessary for the reorganization of the Petitioners. The Petitioners failed to recognize the fact that at the time the sale was approved, they were not in a

reorganization but rather they were in Chapter 7 which called for liquidation of their assets. Furthermore, Judge Matheson in his approval of the Trustee's Application to sell said property indicated that the true value of the said property was $1,150,000.00.

13. On page 28, the Petitioners allege that the Trustee has a current Motion pending filed with the Bankruptcy Court seeking to deny the Petitioners' access to his file. This allegation is not a part of the record and is not properly before this Court on Appeal. However, the Trustee feels it necessary to clarify this matter if it is determined to be relevant. The Trustee did file a Motion seeking an Order restricting the Petitioners' access to his file after a demand was made on the Trustee for complete access to his file with less than twenty-four hours notice. This demand came at a time when the Petitioners had a separate civil action pending against the Trustee in

which they were attempting to collect alleged damages. At the time of this Brief, said civil action has been dismissed by the United States District Court for the District of Colorado which decision was Appealed to the United State Court of Appeals for the Tenth Circuit which Court affirmed the District Court's decision. The Bankruptcy Court granted the Trustee's Motion to limit the Petitioners' access to his files indicating that there were avenues open to the Petitioners to obtain information from the Trustee's files. This decision has not been Appealed by the Petitioners.

14. On page 28 and 29, the Petitioners allege the actual sales price for the mining property was $490,000.00. These figures are not believable and are in fact a total fabrication of the truth. The United States Bankruptcy Court for the District of Colorado, Judge Charles E. Matheson presiding, determined that the

actual value of the sale of said property to the estate was $1,150,000.00. There was never a legitimate cash offer of $300,000.00 more than the sales price realized as alleged by the Petitioners. There was a person who indicated that he might make an offer at a later date however, no actual offer was made.

15. On pages 29 to 31, the Petitioners state as fact that Judge Charles E. Matheson harbored personal prejudice and bias against the Petitioners. These conclusions are based on handwritten notes which may have been made by Judge Matheson. The Petitioners conclude from these notes which apparently state "airline jockey, bartender and buffalo humper" that there was prejudice and bias. There has never been any proof of the alleged prejudice and bias.

16. In pages 31 to 36, the Petitioners attempt to chronicle the course of this litigation. Said chronology is not complete. Petitioners have left out

numerous Motions that they have filed all of which have been denied. Said Motions and the Orders related to those Motions are not a part of the record before this Court and are not a part of this Appeal.

17. On pages 37, the Petitioners make certain conclusions regarding their being uninformed of the bankruptcy proceedings or the ramifications of said proceedings. These statements are not part of the record, are not before this Court on Appeal and are nothing more than unsupported heresay.

18. On page 38, the Petitioners attempt to state reasons why the Court should grant their Petition for Writ of Certiorari. This section of the Petitioners' Petition for Writ of Certiorari appears to continue until page 67 of their Petition.

19. On page 40, the Petitioners allege that there is a tendency in the District of Colorado to appoint Judges

(apparently Bankruptcy Judges) who are creditor oriented. (Where do Petitioners get this?). These allegations are first of all false and have no evidence to support them and are clearly not a part of the record or a part of this Appeal.

20. On pages 40 and 41, the Petitioners allege other statistics about Chapter 11 bankruptcy practice in the State of Colorado none of which is supported by any credible evidence, all of which is improper for inclusion in the Petition for Writ of Certiorari and is not properly before this Court.

21. On page 42, the Petitioners allege that only one creditor has been provided with any compensation. The truth is that the Petitioners' conduct with regard to the continued administration of their bankruptcy estate makes it impossible to close the case and make distribution to creditors as long as there are pending Appeals.

22. On page 42, the Petitioners make allegations of illegal acts and gains of the Trustee. These allegations are absolute lies which have never been supported by evidence, are entirely groundless and are improper to be included in this Petition.

23. On page 44, the Petitioners make allegations regarding the denial of several of their alleged investors to intervene. It is not certain what the Petitioners believe the investors were to intervene in. The investors had numerous opportunities to intervene in the administration of this case if they had been dealt with as creditors, however, the Petitioners have never scheduled these investors as creditors.

24. On page 44, the Petitioners allege that the Trustee converted equipment valued at $330,000.00 for $41,000.00. The equipment in question was sold by the Trustee pursuant to Court Order properly

obtained after notice to all parties in interest. $41,000.00 was the best price that could be obtained. This is another instance of the Petitioners being unable to appreciate the reality of what their assets were really worth.

25. On pages 52 and 53, the Petitioners allege that the United States Bankruptcy Court for the District of Colorado and the United States District Court for the District of Colorado were engaged in conspiracy. Once again, the Petitioners choose to offer no proof in the Court below and there is no evidence in the record before the Court with regard to these conclusions.

27. In pages 57 to 60, the Petitioners try to introduce into their Petition for Writ of Certiorari matters not properly before the Court in that they were never brought before the lower Courts for review. The contents of this part of the Petition for Writ of Certiorari deals with

the sale of certain property in the State of Wyoming which the Petitioners feel was not sold for an adequate price. Again there is nothing in the record to support the Petitioners' contentions.

28. The issues presented in pages 57 to 61 of the Petition for Writ of Certiorari are not matters properly before the Court and appear to have not been matters before any Court at any time other than the allegations by the Petitioners that they have filed Motions to remove the Trustee; to transfer their case to Wyoming and to disqualify Judge Brooks.

V. SUMMARY OF ARGUMENT

A. The decision below in which the United States Court of Appeal for the Tenth Circuit affirmed decisions of the Federal District Court and the United States Bankruptcy Court regarding the conversion of the Petitioners' case to Chapter 7 essentially relates to findings of fact and such determination lies within the sound discretion of the United States Bankruptcy Court. Based on the evidence presented to the United States Bankruptcy Court the Petitioners' Chapter 11 Plan of Reorganization was clearly not feasible and the conversion of the Petitioners' case to Chapter 7 based on that infeasibility and the diminution of value in their estate was clearly justified. There has been no showing of any abuse of discretion.

B. The decision of the United States Court of Appeals for the Tenth Circuit

affirming the Federal District Court and United States Bankruptcy Courts' decisions approving the sale of property of the estate is based on finding of fact that should not be set aside unless they are proved to be clearly erroneous. There was ample evidence before the Court below that the sale of the assets by the Bankruptcy Trustee was for a sufficient consideration. There was no abuse of discretion evidenced by the Courts below and the decision should be affirmed.

C. One of the issues raised in the Petition for Writ of Certiorari has to do with the sale of real estate. The sale was clearly consummated long ago and no attempt by the Petitioners to stay the sale has been successful. As such, the Petition for Writ of Certiorari is moot with regard to the issue of the sale of the Petitioners' property.

D. Petitioners raise numerous other issues which are clearly not before this Court.

VI. ARGUMENT

A. Denial of Confirmation and Conversion of Chapter 7.

1. Standard of Review. A determination that a Chapter 11 plan is not feasible is a finding of fact. In Re: Pizza of Hawaii, Inc., 761 F 2d 1374, 1377 (9th Cir. 1985). Findings of fact of a Bankruptcy Court are not to be set aside unless clearly erroneous and due regard is to be given to the opportunity of the Bankruptcy Court to assess the credibility of the witness. Bankruptcy Rule 8013; In Re: Herd, 840 F 2d 757, 759 (10th Cir. 1988). A determination to convert a case from Chapter 11 to Chapter 7 lies within the sound discretion of the Bankruptcy Court. Albany Partners, Ltd. v. Westbrook; (In Re: Albany Partners, Ltd., 749 F 2d 670, 674 (11th Cir. 1984). Conclusions of law may be renewed de novo.

2. Discussion. At the conclusion of the hearing held regarding the

confirmation of the Petitioners' Chapter 11 Plan of Reorganization, the Bankruptcy Court determined the Petitioners' plan was not feasible and not confirmable under the standards set forth in 11 U.S.C. Section 1129(a). (Bankr. Ct. Tr. 2/26/88, P. 56, et seq.

The primary issue presented to the Bankruptcy Court at the confirmation hearing was whether the plan was feasible, a requirement pursuant to 11 U.S.C. Section 1129(a)(11) to be met before the plan could be confirmed. The Petitioners' plan (Bkpt. Ct. Doc. #182) required substantial payment to creditors and relied upon the Petitioners' ability to mine and sell substantial amounts of sand and gravel to make the required payments. Evidence produced at the confirmation hearing revealed that, although the plan was based upon the Petitioners' operating a sand and gravel mine, the Petitioners had no firm contract to sell gravel (Bankr. Ct. Tr.

2/26/88 p. 21) had no definite financing (I.d. at p. 28) had no money (I.d. at p. 29) and neither leased or owned any of the mining equipment which would be necessary to operate the proposed business essential to implementation of their plan (I.d. at pp. 30-31). The Bankruptcy Court held that the burden was on the Petitioners to prove the feasibility of the plan and the likelihood that the plan would be consummated (I.d. at p. 57). Upon the evidence before it, the Bankruptcy Court determined that the Petitioners' plan was based upon a start-up business which would need substantial infusion of capital and that the Petitioners had no funds (I.d. at pp. 57-58). The Bankruptcy Court noted that Petitioners had brought forward no testimony or evidence concerning a market for the start-up business, the needs of such a market or expectations (I.d. at p. 59). Judicial notice was taken that there were, at the time no major construction jobs in the

Denver area, no evidence that any major jobs would be forthcoming and that the market was in a slump. The Court, therefore found, that the Petitioners had failed to prove the feasibility of the plan and denied confirmation.

The infeasibility of the Petitioners' plan it should be noted, was apparent at the first scheduled hearing on confirmation set for January 19, 1988. At the January 19, 1988 hearing, Petitioners' counsel obtained a continuance due to the admitted inability to prove feasibility. Petitioners had no money to fund the proposed plan and the continuance was sought in order that the Petitioners might secure financing. (See Bankr. Ct. Tr. 1/19/89 pp. 6-9).

Upon making the determination that the Petitioners' plan was not feasible and therefore unconfirmable, the Bankruptcy Court considered the question of whether the case should be converted to a Chapter 7

liquidation proceeding. (Bankr. Ct. Tr. 2/26/88 p. 65). A Motion for conversion to Chapter 7 had previously been made by Grange in conjunction with it's Objection to confirmation of the Petitioners' plan. (Bkpt. Ct. Doc. #194). In addition, the Bankruptcy Court's Order of December 16, 1987, setting the confirmation hearing date gave notice that any Motion whether written or oral to convert the case to a case under Chapter 7 or to dismiss made at any hearing on confirmation shall be heard forthwith by the Court without further notice. (Bkpt. Ct. Doc. #184).

When faced with the question of whether the case should be converted to Chapter 7, Petitioners' counsel initially sought a continuance. A request however was denied by the Bankruptcy Court on the basis that numerous continuances had been given in the past and Petitioners' counsel had himself assured the Court at the prior hearing on January 19, 1988 that no further

continuances would be requested. (Bankr. Ct. Tr. 1/19/88, pp. 6-7). Petitioners' counsel then requested the Bankruptcy Court to convert the case to Chapter 7. (Bankr. Ct. Tr. 2/26/88, pp. 66-67). No position on conversion was then taken by either Frontier or Grange. Based upon the request of the Petitioners' counsel, and upon considering the evidence during the confirmation hearing showing the unlikely rehabilitation of the Petitioners and the continuing deterioration of the estate, the Court ordered a conversion of the Petitioners' case to a proceeding under Chapter 7. (I.d. at p. 69).

The conversion of the Petitioners' case to Chapter 7 was proper under either 11 U.S.C. Section 1112(a) or (b). Pursuant to 11 U.S.C. Section 1112(a), a Debtor in possession of its assets in a voluntary, not previously converted case has an absolute right to convert the case to Chapter 7. Apparently, the Petitioners exercised this right through counsel.

Pursuant to 11 U.S.C. Section 1112(b) a case under Chapter 11 may be converted to Chapter 7, upon the request of a party in interest for cause including the "...continuing loss to or diminution of the estate in absence of a reasonable likelihood of rehabilitation...". Such a request for conversion was made by Grange, a party in interest holding a secured claim, at the time it filed its Objection to confirmation to the Petitioners' plan. Notwithstanding this Motion, the Bankruptcy Court, in addition, had authority under 11 U.S.C. Section 105(a) to issue the Order of conversion on its own Motion.

The District Court, in reviewing the decision of the Bankruptcy Court on Appeal held that under 11 U.S.C. Section 105(a) the Bankruptcy Court could issue necessary Orders on its own Motion. (District Court Order of 7/31/89). In addition, the District Court held that a Chapter 11 case may be converted to a

Chapter 7 case if the Bankruptcy Court found that there was a diminution of the estate and lack of a reasonable likelihood of rehabilitation pursuant to 11 U.S.C. Section 1112(b)(1). (I.d.). The District Court held that the evidence before the Bankruptcy Court supported its conclusion that the Petitioners' rehabilitation was unlikely and that the estate was losing value.

The findings of fact made by the Bankruptcy Court which prevented confirmation of the Petitioners' plan also supported the Bankruptcy Court's decision to convert the case to a case under Chapter 7. The findings of fact are not clearly erroneous and the Orders entered by the Bankruptcy Court upon such findings should be affirmed as affirmed by the United States District Court for the District of Colorado and by the United States Court of Appeals for the Tenth Circuit.

B. Sale of property by the Bankruptcy Trustee.

1. Standard of Review. The determination of whether a sale of property of the estate is permissible lies within the sound discretion of the Bankruptcy Court. In Re: J.R. McConnell, 82 B.R. 43 (Bankr. S.D. Texas 1987). Review on Appeal consists of determining whether the Bankruptcy Court abused discretion in authorizing the sale. The Bankruptcy Court's findings of fact are not to be set aside unless clearly erroneous and due regard is to be given to the Trial Court's opportunity to assess the credibility of the witnesses. Bankruptcy Rule 8013; In Re: Herd, 840 F 2d 757, 579 (10th Cir. 1988). Conclusions of law may be renewed de novo.

2. Discussion. In its review on appeal, the District Court below had before it a transcript of the testimony of Henry Braly and Will James given before the Bankruptcy Court during the hearing on the Trustee's Application to sell property of the bankruptcy estate. The transcript was

designated by the Petitioners as the record on Appeal and supports the decision of the Bankruptcy Court.

. The record sets forth the following facts: (1) Petitioners owed Grange at least $600,000.00, Bankr. Ct. Tr. 112/2/88, p. 20; (2) Petitioners owed Frontier at least $185,000.00; I.d. at p. 4; (3) The Chapter 7 Trustee was unsuccessful in attempting to sell the property to other buyers, I.d. at p. 5; and (4) The fair market value of the property proposed to be sold was not greater than $610,000.00, I.d. at pp. 44, 49 to 50. The sale proposed an exchange of the property to Frontier in full satisfaction of Grange's secured claim and Frontier's administrative priority claim. In essence, therefore, property worth at the most $610,000.00 was used to satisfy, in full, claims totalling at least $845,000.00, $600,000.00 of which was secured by the property conveyed. The amounts of the debt against the property did not include the

amount of interest which had accrued during the several years time the Petitioners were in Chapter 11. The Bankruptcy Court determined that the proposed sale was in the best interest of the estate and, in its discretion, approved the sale. Bankr. Ct. Tr. 12/9/88, pp. 8-9. In fact the Bankruptcy Court determined that the sale was actually worth $1,150,000.00. The Bankruptcy Court's approval of a transaction whereby property was transferred to a party in full satisfaction of such party's administrative claim as well as full satisfaction of the secured and unsecured claims of the creditor having an interest in such property was not an abuse of discretion and should be affirmed as it was by the United States Court of Appeal for the Tenth Circuit.

C. Appeal of Order Approving Sale is Moot.

1. Preface. It is the position of the Trustee that the question of whether

the Bankruptcy Court abused its discretion in approving his Application to sell property of the estate is moot and that review by this Court is not necessary. The issue was made moot by consummation of the sale of the property in January, 1989. No stay of the Order authorizing the sale was obtained pending Appeal nor is any stay alleged to have been obtained. Pursuant to 11 U.S.C. Section 363(m), the reversal or modification of the Bankruptcy Court's Order on Appeal does not effect the validity of the sale to a good faith purchaser, regardless of such purchaser's awareness of the Appeal, unless the Order authorizing the sale was stayed. Upon the failure of the Petitioners to obtain a stay, the Appeal became moot and subject to dismissal. In Re: Vetter Corporation, Corp., 724 F 2d 52, 55-56 (7th Cir. 1983) In Re: Bel Air Associates, Ltd., 706 F 2d 301, 304-305 (10th Cir. 1983) (Interpreting former Federal F.E.D. Rule. Bankr. P. 805).

2. Standard of Review. The issue of the mootness on Appeal of review of the Bankruptcy Court's Order authorizing the sale of the Chapter 7 estate is a question of law. Conclusions of law may be reviewed de novo.

3. Discussion. The District Court below and the United States Appellate Court for the Tenth Circuit in considering Petitioners' Appeal of the Bankruptcy Court's Order authorizing the sale, determined that the Appeal was rendered moot by 11 U.S.C. Section 363(m) upon Petitioners' failure to obtain a stay of the sale pending Appeal.

On December 14, 1988, the Order of the Bankruptcy Court was entered granting the Trustee's Application to sell certain real property to Frontier. On Petitioners' Motion, the Trustee's Application was reconsidered on January 13, 1989. Petitioners' request to reconsider and vacate the Order was denied.

Thereafter, the sale was consummated by execution and delivery of a Trustee's Deed dated January 27, 1989; the Deed was recorded on January 30, 1989 with the Clerk and Recorder of Boulder County, Colorado. No stay of the sale was obtained by the Petitioners pending Appeal.

Pursuant to the provisions of 11 U.S.C. Section 363(m), the sale is final and not subject to modification or reversal upon Appeal. The Petitioners' contentions that the sale and Frontier's purchase of the property was in bad faith and therefore not subject to the stay requirement of 11 U.S.C. Section 363(m), was dismissed by the District Court below on the basis that it could not review issues neither raised in the Bankruptcy Court nor designated for Appeal. The United States Appellate Court for the Tenth Circuit affirmed and this Court, in turn should not consider arguments neither raised or litigated in the Trial Court below.

The sale of the property renders review of the issues involving the propriety of the Bankruptcy Court's decision to permit such sale moot. The Petitioners failed to obtain a stay of the sale and, accordingly the Appeal must be dismissed.

D. Petitioners' Remaining Issues and Contentions are not Properly before the Court on Review.

The Petitioners in their Petition for Writ of Certiorari make numerous allegations concerning events taking place during the bankruptcy proceedings which were not raised or argued in the Court below. Including among these allegations are discussions that the Petitioners had with counsel and other persons not found within the record of Court. These discussions, now being heard for the first time, should not be considered by this Court in its review of the decisions properly before it.

Properly before this Court on Appeal is the decision of the United States

District Court for the District of Colorado entered on July 31, 1989.

Other proceedings have been addressed earlier in this response to the Petitioners' Writ of Certiorari as to the reasons they are not properly before this Court.

Similarly, the settlement agreement (Bkpt. Ct. Doc. #66) is not properly before this Court on review because it was not introduced or accepted as evidence in any of the proceedings now before the Court and, therefore, is not part of the record. The Petitioners' allegations of bias on the part of Bankruptcy Court Judge Charles E. Matheson are without merit. Upon review of this issue by the District Court below, which allegations were founded upon hand written notes of the Bankruptcy Judge submitted by Petitioners outside of the record of Appeal no bias or prejudice was found. On the contrary, the District Court found that the notes reflected a

careful consideration of the evidence by Judge Charles E. Matheson.

It is the position of the Trustee as it was in the Court below that the Bankruptcy Court and the District Court and the Appellate court for the Tenth Circuit have made every attempt to accommodate the Petitioners and have given them repeated opportunities for hearings and chances to present evidence in support of their cases and causes. The Courts have been incredibly patient with the Petitioners and have reached careful, considered decisions before them. It is submitted, respectfully that the time has come if not long over due for these matters to be put to rest.

E. United States Supreme Court Considerations Governing Review on Writ of Certiorari.

United States Supreme Court Rule 10 indicates the considerations governing a review on Writ of Certiorari. Rule 10 indicates that reasons for granting a

Petition for Writ of Certiorari include conflicting decisions between the various Circuit Courts of Appeal related to a same matter; a decision by a United States Court of Appeals which conflicts with a State Court of Last Resort; decisions by State Courts of Last Resort deciding federal questions in conflict with decisions of another State Court of Last Resort or of the United States Court of Appeal; decisions by a State Court or a United States Court of Appeal deciding a question of federal law which has not been but should be, settled by the United States Supreme Court.

Rule 10 also indicates that a Petition for Writ of Certiorari might be granted if a United States Court of Appeals has so far departed from the excepted and usual course of judicial proceedings, or sanctioned such a departure by a lower Court, so as to call for an exercise of this Court's power of supervision. The Petition for Writ of Certiorari could only be granted

related to this last policy consideration. The United States Court of Appeals and the lower Courts in this case however, have not departed from the accepted and usual course of judicial proceedings and exercise of this Court's supervision over the lower Courts is not necessary related to this matter.

VII. CONCLUSION

This Court should deny the Petition for Writ of Certiorari which would allow the decision of the United States District Court for the District of Colorado entered on July 31, 1989 to stand.

The determination of the Bankruptcy Court that the Petitioners' plan of reorganization was unfeasible and the subsequent conversion of their case to Chapter 7 was based upon findings of fact which were not clearly erroneous. The decision of the Bankruptcy Court to approve the Trustee's Application to sell property of the estate was not an abuse of discretion and served to benefit the Petitioners' estate. The reversal or modification of the Order authorizing the sale was not stayed upon Appeal and would not effect the consummation of the sale. Consequently, the Appeal of the Order authorizing the sale is moot. All of the other issues raised by the Petitioners are either not properly before

the Court, or are without merit. or are total misstatements.

The decision of the Tenth Circuit Court of Appeals and the District Court affirmed the Orders of the Bankruptcy Court should be allowed to stand.

Dated this 20th day of September, 1991.

Respectfully submitted,

DeGood, Ball, Easley, Wabeke & Brummet

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VIII. CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of September, 1991 a true and correct copy of the attached Response of Ross J. Wabeke to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was mailed United States postage prepaid to the following:

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Connie A. Salazar
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STATE OF COLORADO)ss
COUNTY OF LARIMER)

The foregoing Certificate of Service was acknowledged before me this 20th day of September, 1991 by Connie A. Salazar.

Witness my hand and official seal.
My commission expires: 03-07-92

Carolyn L. Barrels
Notary Public